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No. 83-279

In the Supreme Court of the United States

OCTOBER TERM, 1983

PIUS XII ACADEMY, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D C. 20530
(202) 633-2217

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Petitioner challenges the court of appeals' affirmance of a Tax Court memorandum decision upholding the Commissioner's denial to it of tax-exempt status. The sole question is whether petitioner submitted sufficient evidence to demonstrate that it would operate "exclusively for * * * educational purposes" within the meaning of Section 501(c)(3) of the Internal Revenue Code.[1] The decision below is correct, does not conflict with that of any other circuit, and does not warrant review by this Court.

[1]Sections 501(a) and 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.) provide in conjunction that any organization "organized and operated exclusively for * * * educational purposes," or for other specified charitable purposes, "shall be exempt from [federal income] taxation."

1. Petitioner was organized in August 1979 as an Ohio non-profit corporation with the stated intention of operating a "traditional Catholic school" (Pet. App. 26, 29). Petitioner had not begun operations when it applied to the I.R.S. for a tax exemption; it had no students, faculty, assets, liabilities, educational facilities or state charter (Pet. App. 29). Petitioner's exemption application indicated that its expected sources of revenue would be "charitable bingo proceeds, parents' contributions, church contributions, third-party donations and other, as yet undetermined, fund-raising means" (Pet. App. 28-29). Petitioner expressed a strong interest in obtaining a bingo license, which, under Ohio law, is conditioned on an organization's having been in existence for two years and having secured an I.R.S. determination of tax-exempt status (Pet. App. 29).

After studying petitioner's application, the Commissioner twice requested that it supply additional information concerning the proposed operation of its school (Pet. App. 29-30). Petitioner responded inadequately, or not at all, to these requests. Specifically, petitioner admitted that it had no curriculum guidelines, stating only that its courses "would be somewhat similar to those offered in Ohio public schools"; that it could not yet prepare a proposed budget; that the school would be located "somewhere in Franklin County, Ohio"; and that it "hoped [to] open in August 1981" (Pet. App. 31). Petitioner said nothing about the number of students or faculty expected (Pet. App. 31), but did respond in some detail about its planned bingo operations (Pet. App. 37).

The Commissioner denied petitioner's application for a tax exemption and petitioner, after exhausting administrative remedies, sought review in the Tax Court.[2] The Tax

[2]Section 7428(a)(1)(A) of the Code permits an organization to seek a declaratory judgment concerning a determination by the Commissioner as to its "initial qualification or continuing qualification • • • as an organization described in section 501(c)(3) • • •."

Court held that the administrative record supported the Commissioner's denial of an exemption, agreeing that petitioner had failed to supply enough information to demonstrate that, "when operational, if ever, [it would] conduct all of its activities in a manner which [would] accomplish its exempt purposes" (Pet. App. 35-36). The court of appeals affirmed in a one-sentence judgment order (Pet. App. 24).

2. Petitioner contends that the decision below confronts it with a dilemma. In petitioner's view, the Commissioner has denied it tax-exempt status because it is not yet "fully organized" (Pet. 1), whereas it assertedly cannot become "fully organized" until it obtains its bingo license, which under Ohio law depends on its having secured a tax exemption (Pet. 18-23). This contention has no merit.

Section 501(c)(3) affords tax exemption to organizations that are *both* organized *and* operated exclusively for educational (or other charitable) purposes; an entity cannot qualify if it fails either the "organizational test" or the "operational test." *E.g., General Conference of the Free Church* v. *Commissioner*, 71 T.C. 920, 926 (1979).[3] A charity need not have begun operations to be recognized as tax-exempt. If it seeks recognition "in advance of operations," however, it must provide in its application to the I.R.S. sufficient details of its *proposed* operations "to permit a conclusion that [it] will meet the particular requirements of the section under which exemption is claimed." Treas. Reg. § 601.201(n)(1)(ii). See Treas. Reg. §1.501(a)-1(b)(1)(iii) (requiring that an application for tax exemption be accompanied by "a detailed statement of [the entity's] proposed activities"); Treas. Reg. §1.501(a)-1(b)(2) (authorizing Commissioner to "require any additional information deemed necessary" for a proper determination of exempt status).

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[3]The "organizational test" was not at issue below, since the Commissioner's rejection of petitioner's application was based solely on the "operational test." See Pet. 35.

The Tax Court properly concluded that petitioner failed to provide sufficient information to demonstrate its entitlement to a tax exemption. Petitioner's inability even to predict answers to basic questions about its proposed curriculum, student body, faculty, finances, and location indicates that "it had no plan to operate a school in the foreseeable future" (Pet. App. 37). Indeed, petitioner's plans were so vague that it had little more than "a concept or idea that at some point in the future it would, if economically feasible, operate a school" (Pet. App. 36). Because it inadequately documented its plans, petitioner failed to satisfy the "operational test" of Section 501(c)(3). Accord, *Basic Unit Ministry* v. *United States*, 511 F. Supp. 166, 168 (D.C. D.C. 1981), aff'd, 670 F.2d 1210 (D.C. Cir. 1982) (per curiam); *General Conference of the Free Church* v. *Commissioner*, 71 T.C. at 931-932; *Church in Boston* v. *Commissioner*, 71 T.C. 102, 106-107 (1978); *Levy Family Tribe Foundation* v. *Commissioner*, 69 T.C. 615, 619 (1978).[4]

Contrary to petitioner's belief (Pet. 18-19), the court of appeals' judgment does not foreclose it from operating a school, nor does it confront petitioner with a "dilemma" in view of Ohio's laws concerning bingo operations. Petitioner does not have to secure a bingo license, or even be "fully organized," in order to be accorded tax exemption; it is simply required to demonstrate, by furnishing reasonably

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[4]Petitioner's reliance (Pet. 13-14) on *Dumaine Farms* v. *Commissioner*, 73 T.C. 650 (1980), is misplaced. The organization involved in that case owned substantial assets, submitted an estimated budget, described its proposed operations in detail, and held discussions with various public organizations concerning the proposed operation of its experimental farm. *Id.* at 653-656. On those facts the Tax Court was able to find (*id.* at 671) that the organization was organized and operated exclusively for educational and scientific purposes. Petitioner, by contrast, had no assets, no facilities and no faculty, and was unable to provide the Commissioner with either a proposed curriculum or a proposed budget.

specific answers to straightforward questions about its proposed educational activities, that it meets the statutory standards. The Tax Court noted (Pet. App. 38) that its holding "does not preclude petitioner from filing a new application with [the I.R.S.] that includes all of the appropriate information necessary for a favorable determination." The decision below is purely factual, is fully supported by the record, and does not warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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